Argued by
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 63

NELSON SIBRON,

Appellant,

—against—

THE STATE OF NEW YORK,

Respondents.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

BRIEF FOR RESPONDENTS

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Statement

This appeal reviews a judgment of the New York Court of Appeals dated July 7, 1966 which affirmed without opinion an order of the Appellate Term of the Supreme Court, Second Judicial Department, dated October 15, 1965. That order affirmed a judgment of conviction entered in the Criminal Court of the City of New York, County of Kings, on April 23, 1965 which imposed upon appellant a sentence of six months imprisonment in the New York City Workhouse following his conviction for a violation of Public Health Law, Section 3305 in the misdemeanor possession of narcotic drugs. The judgment of the Court of Appeals is reported in 18 N.Y. 2d. 603. The order of the Appellate Term is unreported.

Jurisdiction

The jurisdiction of this Court rests upon Title 28 U.S.C. Section 1257(2).

Questions Presented

Appellant contends:

That Section 180-a of the New York Code of Criminal Procedure authorizes an unreasonable search in violation of the Fourth and Fourteenth Amendments to the Federal Constitution; and that,

Even if, assuming *arguendo,* the statute is not in its terms unconstitutional, it was, in its application to the case at bar, unconstitutionally utilized.

It is our answer that the statute as drawn, and as interpreted by the New York Court of Appeals, does not violate the Fourth or Fourteenth Amendments.

We do, however, concede that that Court erroneously applied the statute in the case at bar.

Constitutional and Statutory Provisions Involved

Section 180-a of the Code of Criminal Procedure.*

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and

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* The text of the statute appears at p. 8 of this brief.

> no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment, Section 1 to the United States Constitution provides:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Record Facts Material to the Questions Presented

A complaint filed by Patrolman Anthony Martin in the Criminal Court of the City of New York, County of Kings, charged appellant with a violation of Penal Law, Section 1751 in the felonious and unlawful possession of a quantity of the narcotic drug, heroin.

Appellant's motion to suppress the narcotics on a claim of unlawful search and seizure was denied on March 31, 1965 at the conclusion of a hearing. On April 23, 1965, he pleaded guilty to possession as a misdemeanor and was sentenced as a multiple narcotics offender to a term of imprisonment of six months in the Workhouse.

On the appeal to the Appellate Term of the Supreme Court, Second Judicial Department from the judgment of

conviction, the Court properly (and by virtue of the provisions of Code Crim. Pro. Section 813-c) considered the concomitant appeal from the order denying the motion to suppress; and then affirmed the order and the judgment without opinion.

The Court of Appeals in turn affirmed the order of the Appellate Term without opinion, Fuld and Van Voorhis, JJ. dissenting (18 N.Y. 2d 603). The Court amended its remittitur to state the question of the constitutionality of Code Crim. Pro. § 180 (18 N.Y. 2d 723).

Both New York appellate courts were concerned specifically with, and ultimately decided, only the question of the constitutional legality of the arresting officer Martin's procurement of the drugs, the possession of which formed the basis of the prosecution. We therefore present for this Court's convenience a summary of the testimony taken on the suppression hearing.

The Hearing

Appellant, a drug addict* (7) **with a record of prior criminal convictions for burglary and possession of narcotics, testified that on March 9, 1965 the patrolman, then in uniform, met him in a restaurant and, after directing him to come outside and after asking him "if I knew what he was looking for" (to which appellant answered "No"), searched him (8) and took from his jacket pocket ten bags of heroin "which I possessed at the time." No search warrant was shown (9).

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* The record contains no proof that the officer had any knowledge of appellant's addiction.

** Page references are to the Transcript of the Record.

Appellant testified under cross-examination that in the restaurant he had been talking to several narcotic addicts about other narcotics addicts (12).

Patrolman Anthony Martin had, during the hours of 4:00 P. M. to Midnight on March 9th (13), witnessed appellant in conversations with a number of persons known to the policeman to be narcotic addicts (14). Martin later followed him into the restaurant where appellant was talking to three other addicts (15) and asked him to come outside. There the patrolman said: "You know what I am after," whereupon appellant reached into his own pocket "and he held something into his hand." The patrolman simultaneously "went into his pocket." As he did so "inside his pocket I saw in his hand and in his pocket he was ready to grab this cellophane—actually it was a metal tin foil wrapper." Martin "grabbed it off him." "It" was ten glassine envelopes (17).

On cross-examination there developed the only evidence which the record contains relative to the patrolman's apprehension of danger:

> "Q. When he reached into his pocket, you didn't think he was reaching for a weapon? A. I thought he might have been.
>
> Q. But he came up with a piece of tin foil; didn't he? A. Yes.
>
> Q. And that's when you grabbed his hand? A. Well, he had his hand in his pocket. I put my hand in his pocket. At that time I caught him with his hand in his pocket."

Redirect examination of the officer made it clear that Martin had no knowledge of the subject—or tenor—of appellant's conversations with the narcotic addicts (18).

The hearing Court, after indicating some doubt concerning the legality of the patrolman's procedure (19), ultimately denied the motion upon the ground that "the police officer's action was predicated on probable cause" (21).

Foreword

The annals of organized communities known to history show an unremitting struggle by the community to protect itself against those members who break its laws. (Given the demonstrated imperfectibility of human nature, it is probable that pre-historic communities faced, and dealt with, the same problem.) The current experiences of our own contemporary society show that the struggle is increasing in intensity and magnitude to the point where only an unwarranted optimism can assume that our society is, or will shortly be, victorious over its internal enemies.

In dealing with the problem of crime the community follows various paths of resistance to, and attempted victory over, the depredations of criminals.

The first approach is, by an understanding of the causes of crime, to develop means and practices adequate to remove these causes. In our own day numerous studies have been undertaken and much money has been expended. It needs no extended discussion to demonstrate that with all possible good will and despite the utilization of great powers of understanding and expenditure of much treasure, the solution of our current problems of crime cannot be immediate. Indeed, we shall be fortunate if the answers are not too long delayed.

When society reaches an understanding, or when, even, it attains a partial knowledge, of the causes of crime it adopts manifold methods of eradicating these causes. Energy is devoted to the spread of education, the amelioration of unemployment and the distribution of opportunity, in order that in this field, at least, some of the cancer causes of crime —ignorance and poverty—may be removed; and where not completely removed, at least minimized.

There always remains, however, the hard core of the criminal cadre. Society therefore bends its efforts to the apprehension of the criminal, to his trial in the Courts of justice, and to his conviction according to constitutional concepts of due process.

Finally, when through the procedures of apprehension, trial and conviction, the criminal is imprisoned, some effort is devoted to the task of reformation, in the hope and to the end that when the criminal is returned to society, he will not again be a menace or a detriment.

It is obvious beyond need for elaboration that none of the societal purposes which we have thus in briefest form outlined can be attained unless first of all the criminal is apprehended. The criminal who is not caught cannot be convicted and, hopefully, reformed. It is equally apparent that the community's first line of defense—indeed, its only real defender and protector—is the peace officer. This being so, no rule of law which attempts to insure the safety of the officer in the performance of his obligatory duty should be disturbed, except under the compulsion of the clearest constitutional necessity.

It is therefore our purpose in this brief to demonstrate: first, that there is a compelling necessity in our contempo-

rary society to protect the peace officer; second, that the powers granted to him by New York's Code of Criminal Procedure, Section 180-a are reasonably adapted to the necessary purpose of protection and not broader in practice than the underlying necessity of protection; and third, that the statute does not offend the constitutional prohibitions of the Fourth Amendment or the affirmative due process requirements of the Fourteenth Amendment.

POINT I

Code of Criminal Procedure, Section 180-a should be declared to be constitutional in purpose and scope.

The statute provides:

> "1. A police officer may stop any person abroad in a public place whom he reasonably suspects is committing, has committed or is about to commit a felony or any of the crimes specified in section five hundred fifty-two of this chapter, and may demand of him his name, address and an explanation of his actions.
>
> "2. When a police officer has stopped a person for questioning pursuant to this section and reasonably suspects that he is in danger of life or limb, he may search such person for a dangerous weapon. If the police officer finds such a weapon or any other thing the possession of which may constitute a crime, he may take and keep it until the completion of the questioning, at which time he shall either return it, if lawfully possessed, or arrest such person. Added L. 1964, C. 86, Section 2, eff. July 1, 1964."

The statute permits two affirmative acts by the police officer. He is given authority in the first instance to stop

any person in a public place provided he reasonably suspects that the person is presently committing, has committed or is about to commit a felony or certain specified misdemeanors; and having thus stopped him, to demand his name, address and an explanation of his actions. *It is to be noted that the officer has no powers of continued detention and that the person thus stopped is neither required to answer the officer's questions nor to remain in his presence.* Because the statute grants no power to detain, the issue of detention is not present in the case at bar. For this reason we do not discuss those Codes and statutes which in varying degree do include the power to detain, either in or out of the police station house: Uniform Arrest Act, Section 2; Delaware Code Annotated Title 11, Sections 1902-1903; New Hampshire Rev. Laws, Sections 594:2-594:3; Rhode Island Gen. Laws, Sections 12-7-1—12-7-12; American Law Institute, Model Code of Pre-Arraignment Procedure, Section 2.02, tentative draft No. 1, p. 6, March 1, 1966. The second power granted the officer is that if he reasonably suspects the existence of danger to his own life or limb, he may search the stopped person for a dangerous weapon.*

The Court of Appeals first construed the statute in *People v. Rivera,* 14 NY 2d 441, cert. den. 379 U.S. 978, even though the statute, although already enacted, did not control the disposition of the case because *Rivera* had committed the crime of unlawful possession of a contraband pistol prior to the effective date of its operation. Nevertheless, in his reasoning Bergan, J. was guided by the close resemblance

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* The subsequent action of the officer, in the return or retention of a weapon or any other criminal contraband thus found, is discussed at p. 43 of this brief.

between the provisions of the statute and the common law doctrines under which he (for a majority of six judges on a Court of seven members) concluded that the police act of stopping and searching Rivera was permissible and not violative of the Fourth Amendment. This act consisted of a "frisk"; that is, a patting of the defendant's outer clothing resulting in the discovery of a pistol. Judge Bergan thus stated both the duty and the power of the police under the circumstances of the case:*

> "The first problem is the authority of the police in the circumstances shown here to stop and question defendant. The validity of subsequent police action would in turn necessarily rest on the initial right to make the immediate and summary street inquiry.
>
> The authority of the police to stop defendant and question him in the circumstances shown is perfectly clear. The business of the police is to prevent crime if they can. Prompt inquiry into suspicious or unusual street action is an indispensable police power in the orderly government of large urban communities. It is a prime function of city police to be alert to things going wrong in the streets; if they were to be denied the right of such summary inquiry, a normal power and a necessary duty would be closed off."

He continued:

> "And the evidence needed to make the inquiry is not of the same degree or conclusiveness as that required for an arrest. The stopping of the individual to inquire is not an arrest and the ground upon which

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* These were that the defendant and his companion had in the early morning hours acted suspiciously in a New York City neighborhood with a high incidence of crime, and had sought to leave the scene rapidly when they observed the police.

> the police may make the inquiry may be less incriminating than the ground for an arrest for a crime known to have been committed. It is enough for the purposes of this case to rule that the police were justified in the record as here developed in stopping and in questioning defendant."

Judge Bergan traced the ancestry of the police-power to stop and question to the common law (2 Hawkins, Pleas of the Crown, 122, 129 (6th ed., 1777); 2 Hale, Pleas of the Crown 89, 96-97 (Amer. ed., 1847); *Lawrence* v. *Hedger,* 3 Taunt. 14, 128 Eng. Rep. 6 (Common Pleas, 1810); *People* v. *Marendi,* 213 N.Y. 600, 609, saying:

> "Indeed, the right of the police to stop and question the defendant in such circumstances as those disclosed by this record was recognized at common law. It is extensively treated both by statute and by judicial decision as a reasonable and necessary police authority for the prevention of crime and the preservation of public order (citing.)" *

The N.A.A.C.P. *amicus* brief (p. 19, note 35) disputes the accuracy of Judge Bergan's statement of the police powers lineage and argues that his construction, and that of other courts, of the cited English authorities rests upon a misconception of the English use of the term "reasonable suspicion". It is contended that the phrase does not in reality mean what it says but "is the equivalent of American constitutional 'probable cause' ".

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* To these citations may be added *Queen* v. *Tooley,* 92 Eng. Rep. 352 in which the Judge after upholding the right of the Constable to stop and inquire said: "It is not the Constable suspecting that will justify his taking up a person, but it must be just grounds of suspicion * * *".

The New York acceptance of the common law power to stop and question without the necessity of a formal arrest and upon reasonable suspicion is supported by the similar holdings of the Court of Appeals for the Second Circuit, *United States* v. *Vita,* 294 F 2d 524, 530; *United States* v. *Middleton,* 344 F 2d 78, 83; and of other Courts: *Goss* v. *State,* 390 P 2d 220 (S. Ct. Alaska), cert. den. 379 U.S. 859; *State ex rel. Branchaud* v. *Hedman,* 299 Minn. 375; *State* v. *Hope,* 84 N.J. Super. 551; *State* v. *Terry,* 50 Ohio App. 2d 122; *People* v. *Michelson,* 59 Cal. 2d 448; *United States ex rel. Corbo* v. *LaVallee,* 220 F 2d 513, 518, cert. den. 361 U.S. 950). Indeed Judge (now Chief Judge) Fuld, the sole dissenter in *Rivera, supra,* wrote:

> "I have no doubt that the police, in the proper performance of their duties, have a responsibility to investigate suspicious activity and that one permissible form of investigation is the temporary stopping and questioning of individuals so engaged. (see, e.g., Ellis v. United States, 264 F 2d 372, cert. den. 359 US 998; Green v. United States, 259 F 2d 180, cert. den. 359 US 917)."

We submit that the authority of these courts is paramount.

If the right to stop and question upon reasonable suspicion is established—and it is our submission that the authorities we have cited are determinative that such right is established—the question presents itself: is the police officer, acting in the obligatory performance of his public duty, entitled to protection against the hazards of that performance? Put in another form: is there any constitutional prohibition—and specifically, are the Fourth and Fourteenth Amendments constitutional prohibitions—against minimizing the ever-present danger to the police officer incident to his obligatory performance of his public duty?

In *Rivera,* Judge Bergan answered:

> "If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty."

Judge Bergan was not unmindful of, nor did he disregard, the argument (p. 446) "advanced by defendant that the exterior touching is a 'search' in the full meaning of that term and carries against its validity all of the weight of judicial interpretation (citing)." He thus met the issue (p. 446 seq.):

> "It is something of an invasion of privacy; but so is the stopping of the person on the street in the first place something of an invasion of privacy. The frisk is less such invasion in degree than an initial full search of the person would be. It ought to be distinguishable also on pragmatic grounds from the degree of constitutional protection that would surround a full-blown search of the person.
>
> That kind of search would usually require sufficient evidence of a committed crime to justify an arrest or be an incident to a lawful arrest (Harris v. United States, 331 US 145 (1947)). In the end, as in most close issues of public policy, a court is called upon to strike a fair balance of competing interests.
>
> And as the right to stop and inquire is to be justified for a cause less conclusive than that which would

> sustain an arrest, so the right to frisk may be justified as an incident to inquiry upon grounds of elemental safety and precaution which might not initially sustain a search. Ultimately the validity of the frisk narrows down to whether there is or is not a right by the police to touch the person questioned. The sense of exterior touch here involved is not very far different from the sense of sight or hearing—senses upon which police customarily act."

And, countering the defense argument that, however limited the "frisk" might be, it was nevertheless a search, he answered (447):

> "The constitutional restriction is against unreasonable searches, not against all searches. And what is reasonable always involves a balancing of interests: here the security of the public order and the lives of the police are to be weighed against a minor inconvenience and petty indignity. A similar police procedure has long been sustained in California (People v. Martin, 46 Cal. 2d 106 (1956))."

He found support for this "balancing of interest" in the permissive language of this Court in *Ker* v. *California*, 374 U.S. 23, 34:

> "The States are not thereby precluded from developing workable rules governing arrests, searches and seizures to meet 'the practical demands of effective criminal investigation at law enforcement' in the States."

And he concluded:

> "The precautionary procedures followed by police in questioning this defendant are within the standard thus established by the Supreme Court. They

> meet the 'practical demands of effective criminal investigation.' And in our view the steps taken here were not unreasonable."

We assert the belief that if the Court of Appeals had continued to confine its analysis of Section 180-a as a grant of permission only to "frisk" when justified by a reasonable suspicion of personal danger to the policeman, and if the Court had subjected later cases to this test, no problem of constitutional wrong would be presented. Candor compels the concession, however, that in all (except one*) of the cases decided by the Court of Appeals subsequent to *Rivera,* the Court has progressively widened the scope of the "frisk" to the point where the "frisk" has become a search of the person or property of the defendant.

Thus, in *People* v. *Pugach,* 15 N Y 2d 65, the defendant's briefcase was opened by the police and a loaded firearm discovered therein. He was then seated in an automobile, surrounded by police officers. The Court, in an opinion concurred in by six members, considered that the weapon was concealed upon his person in terms of Penal Law, Section 1897 prohibiting such posession, and concluded that therefore the search of the briefcase was in reality part of the "frisk" of the person. With all deference due to the majority, we are nevertheless compelled to agree with the opinion of Fuld, J., the sole dissenter, that the search was a search and not a frisk.

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* *People* v. *Peters,* 18 NY 2d 238. We believe that in *Peters* the Court of Appeals was warranted in basing its approval of an ultimate search of defendant's person on the fact of a preliminary "frisk" which had disclosed "something hard which could have been a knife." Since *Peters* is a companion case and will be separately argued before this Court, we do not further discuss it here.

The Court next dealt with the case at bar and with *People* v. *Peters, supra,* and affirmed the judgment of conviction without opinion, but clearly upholding the legality of what it conceived to be a frisk.*

In its last construction of Section 180-a (*People* v. *Taggart*, 20 N Y 2d 335) the Court finally (and again with Fuld, now Chief Judge as the sole dissenter) reached the position that the statute, under the appropriate circumstances of reasonable suspicion concerning the commission, either past, present or imminent, of crime and, also, of reasonable apprehension by the officer of personal danger, does authorize a full search of the person.

It is important to analyze the facts of *Taggart* and the reasoning of the opinions written by Breitel, J. for the majority and by VanVoorhis, J. in concurrence.

A detective, alerted by an anonymous telephone call that a man with described physical characteristics and wearing "white chino-type pants" was standing on a street corner with "a loaded 32 calibre revolver in his left-hand jacket pocket," found Taggart at that corner wearing such pants and surrounded by "a group of children that had just finished howling." He searched Taggart and took a revolver from the indicated jacket pocket. The search was not preceded by a frisk, nor did the detective preliminarily "notice any bulge in the defendant's pocket prior to the search as the weapon 'was inside the lining of the jacket'." Breitel, J., conceding that the case involved a search and not a "frisk," wrote:

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* We reserve the expression of our attitude towards this case until p. 45 of this brief. Similarly, we reserve our discussion of the limited dissent of VanVoorhis, J. until p. 42 of this brief.

"This case raises a very serious problem which has not yet been faced directly under the newly evolved rules excluding evidence obtained unlawfully under the principle in Mapp v. Ohio (367 US 643). There are exigencies affecting life, limb or grave property damage in which the police received information of crime, not sufficient to establish probable cause for arrest and incidental search, and yet which, to any reasonable man, demand the taking of police action to prevent serious harm. In such cases it is not enough to say that nothing should be done, or that if something is done, the resultant evidence should be suppressed. To do nothing is to succumb supinely to serious injury to members of the public or to the State itself, sincerely believed to impend, particularly as the test for action is supposed to be what a reasonable man would do under the circumstances (see Ker v. California, 374 US 23, 34-35; Johnson v. United States, 333 US 10, 13-14). To tolerate unconstitutional action as a matter of necessity, as some argue, but then to reject use of the evidence obtained, is hardly a proper way to justify illegal conduct as necessary, on the one hand, but to limit, on the other hand, the consequences of those actions as illegal. Needless to add, the serious problem is suggested only in cases involving serious personal injury or grave irreparabe property damage and not by the problems associated with the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like. In this case a loaded pistol was involved. And one could hypothesize parallel cases involving explosives, poisons, or the larceny of an irreplaceable classic work of art. The presence of the suspect among a group of children is a particular circumstance suggesting that the occasion was not

one in which a preliminary interrogation and perhaps a limited frisk before search was indicated, if the safety of the children or the police officer was to be respected. For the police to have ignored the information received is not an acceptable thesis, despite the anonymity and, therefore, the undetermined reliability of the source.

The discussion is not whether exigent circumstances justify a departure from constitutional limitations. That view is impermissible. The point is that the Constitution forbids 'unreasonable' searches and what is reasonable is determined by the circumstances and the exigencies are not to be ignored (see Camara v. Municipal Ct., 387 US 523, 538-539).'' (Italics ours).

He concluded:

"Even assuming that under normal circumstances the 'search' allowed by section 180-a should be limited to a 'frisk', the action of the detective in this case was proper, because of the additional circumstances. Delaney had a reasonably based suspicion not only that defendant was carrying a pistol but also that the weapon was located in his left-hand jacket pocket. It would seem unreasonable to require an officer in that situation to engage in a preparatory and undoubtedly dangerous frisk—particularly in view of the fact that defendant was standing in the middle of a group of children at the time of the search."

The concurring opinion of VanVoorhis, J. is equally illuminating:

"For reasons cogently stated in Judge Breitel's opinion herein, as it seems to me, probable cause to arrest is not necessary where there is reason to suspect that a particular individual is unlawfully carry-

ing a dangerous weapon, or posesses a bomb on an airplane, a nuclear device in the Grand Central Station or in some comparable situation. In my view there is no legal difference between the situation here presented and the situations which confronted the court in People v. Rivera (14 NY 2d 441, cert. den. 379 US 978), People v. Pugach (15 NY 2d 65, cert. den. 380 US 936), People v. Peters (18 NY 2d 238) or People v. Sibron, 18 NY 2d 603). In either instance it is suspicion engendered by some circumstance short of constituting probable cause to make an arrest that justifies the invasion of a defendant's person for the discovery of a dangerous weapon. It does not matter whether the suspicion is created by an anonymous telephone call from an unknown informer or the suspicious presence of the defendant in the hall of an apartment house, his behavior in front of a store on the street, or the protrusion of some concealed object in his clothing which proves to be a knife or a revolver. In the Peters and Sibron cases the writer differed with the court majority only in that it seemed to him that frisking a man's person to discover a revolver, based on suspicion rather than upon probable cause for arrest, could not lead to his arrest and conviction unless what was discovered was a weapon. Peters possessed burglar's tools and Sibron had heroin in his pocket. I thought that the possibility of immediate danger, to the police officer or to the public, arising from the possession of a dangerous weapon was all that justified invading his person for the discovery of weapons, and that, unless weapons were found upon him, the invasion of his person could not be turned to account by the prosecution to convict him of anything other than illegally carrying a weapon. If the thinking of the majority in Peters and Sibron or my own more limited construction be followed,

there is no reason on account of which this appellant could not have ben adjudged a youthful offender, as he was on his plea of guilty, of attempted felonious posession of a firearm. It is not necessary that there shall have existed probable cause to make an arrest. If there was reasonable basis for suspicion, as arose from the information furnished by an anonymous informer, the police could search him for a weapon which was uncovered when they did so. This was, in my view, tantamount to a frisk. I agree that the judgment and the order denying the suppression of evidence should be affirmed."

There emerges from these opinions the clear pronouncement by the Court of its belief that no constitutional prohibition — and specifically not the Fourth and Fourteenth Amendments—stands in the way of the implementation of the purposes of Section 180-a by a search of the person, provided there exists reasonable suspicion of the present factors of crime and of danger to the officer. The Court of Appeals having thus construed the New York statute, this Court, following its long established practice, will accept that construction and adjudicate the case on that basis. (*Adderly* v. *Florida*, 87 S. Ct. 242.)

Appellant and *amici* unite in a chorus of protest and dissent. The refrain of the chorus is that this Court has never sanctioned—indeed, has always prohibited—searches of the person, unauthorized by a warrant, or not incidental to a lawful arrest or not consented to; and that even in these cases both the warrant and the arrest must be based upon probable cause. That which has never been, they say, cannot now be.

It will eliminate needless discussion for us to concede, as we do, that in the case of the *traditional* search, this Court

has from the time of *Boyd* v. *United States,* 116 U.S. 616, to its latest pronouncement, *Camara* v. *Municipal Court,* 387 U.S. 523, and in all intermediate cases whether involving a search of the person, (*Henry* v. *United States,* 361 U.S. 98), or of a moving vehicle, (*Carroll* v. *United States,* 267 U.S. 132, *Brinegar* v. *United States,* 338 U.S. 160), or of premises, (*Mapp* v. *Ohio,* 367 U.S. 643; *Ker* v. *California,* 374 U.S. 23; *Camara* v. *Municipal Court, supra*), insisted that, absent the authorization of a judicial search warrant or the usually improbable fact of consent, the search must be conducted as an incident to an arrest which is itself lawful because it is based upon probable cause to believe that the defendant has committed or is about to commit a crime. The Court, however has never as yet adjudicated the specific question herein involved. It is our submission that no process of analogical reasoning can lead to the proper determination of the problem. Therefore precedents—the Court's decisions in a field having only an apparent resemblance to the problem of the instant case—are of but minimal use in the solution of the problem.

With all respect to the sincerity and scholarship of our opponents and their prodigious labors, we submit that they have overlooked the pertinent differences which are present in the searches permitted by Section 180-a and the traditional searches upon which they focus their attention.

It is clear, we believe, beyond possibility of obscuring that Section 180-a search is designed solely to protect the officer in the legitimate pursuit of his obligatory duties. On the other hand, the searches prohibited by the Fourth Amendment have always been undertaken for the purpose of discovering that evidence which will ultimately lead to the

conviction of a defendant who at the moment of the search is not only the target of the investigation but is in the "accusatorial stage" which has already brought the public authorities to the decision to arrest him for the purpose of prosecution (*Escobedo* v. *Illinois,* 378 U.S. 478). At this point the Fourth Amendment (and the Fifth and the Sixth Amendments; *Escobedo* v. *Illinois, supra*) intervene to prevent the authorities from convicting him through his own mouth or through the invasion of that privacy which the Fourth Amendment guarantees.

As this Court wrote in *Boyd* v. *United States,* 116 U.S. 616:

> "It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, * * *. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the condemnation * * * [of those Amendments]."

Surely it is a distorting analogy which sees a complete parallel between the two disparate searches.

The purpose for which the exclusionary rule enforced by this Court was fashioned was described in *Elkins* v. *United States,* 364 U.S. 217. It

> "is to deter—to compel respect for the constitutional guarantee in the only effectively available way—by removing the incentive to disregard it."

But when an officer stops and searches a person whom he considers to be dangerous, he does so, not to procure evidence which will lead to ultimate prosecution and conviction, but solely in order to protect himself against a danger reasonably suspected to exist. Therefore, as the Supreme Court of New Jersey pertinently observed in *State* v. *Dilley* (49 N.J. 460):

> "That being so, the evidential exclusion of the weapon he uncovers would in nowise avoid future conduct of similar nature on his part or serve any of the deterrent purposes of Mapp. v. Ohio."

Nor, we believe, have objectors to stop and search sufficiently considered the probable—and in many instances, the certain—consequences of a destruction of the power to search. One—the numerous deaths of or injuries to, officers—is demonstrated by the statistics of such death and injury to which we refer at pages 25 seq. of this brief and which we show in exhibits. The other—perhaps not so certainly demonstrable by statistics but quite reasonable in assumption—is that the security of the community will be endangered by the unwillingness of officers to risk their own safety under circumstances in which they cannot protect themselves. Police officers, even of the highest type, are but human beings subject to human frailties. It is not to be expected of them as a class that they should risk their lives in the fulfillment of their duties unless they are given the right, at least to minimize the dangers of such risk. The New Jersey Supreme Court wisely observed in *Dilley, supra*:

> "Freedom and privacy are precious rights which must be zealously guarded for the individual. But without the general security of law and order they

> would lose their meaning for all. This was fully recognized in the fourth amendment which balances the rights of the individual and society and embodies the test of reasonableness. While the Supreme Court has gone to great lengths in vindicating the rights of the individual as guaranteed by the amendment, it has done so with stated awareness of the practical needs of 'effective criminal investigation and law enforcement' in the States (Ker v. California, 374 US 23, 34, 10 L. Ed. 2d 726, 738, 1963) and with stated acknowledgment that the validity of particular police action under the amendment will turn on its reasonableness in the light of 'the facts and circumstances of each case' (Cooper v. California, supra, US at , 17 L. Ed. 2d at 732)."

All authorities and all students of the problem agree that the greater the number of unprevented and undiscovered crimes, the greater the increase in subsequent crimes. It is but the part of homely wisdom to realize that criminals are encouraged to continue in criminal practices by society's weakness either in preventing the commission of earlier crimes or in the discovery and punishment of criminals.

We think also that in analogyzing and equalizing these disparate searches, our opponents have forgotten the maxim *necessitas facit licitum quod alias non est licitum.* That the necessity for Section 180-a exists is conclusively demonstrated by the facts of contemporary life.

The report of the President's Commission on Law Enforcement and Administration of Justice, entitled "The Challenge of Crime in a Free Society" (United States Government Printing Office, February 1967, p. 18) notes as the statistics for the estimated number and percentage of reported offenses in 1965 alone these truly horrifying figures:

Murder and Non-Violent Manslaughter, 9,850; Forcible Rape, 22,467; Robbery, 118,916; Aggravated Assault, 206,-661; Burglary, 1,173,201; Larceny of $50 or over, 762,352; Motor Vehicle Theft, 486,568; in a total of crimes against the person numbering 357,894 and of property crimes numbering 2,422,121. The same Report (p. 20), dealing with the incident of unreported crime, states that "although the police statistics indicate a lot of crime today, they do not begin to indicate the full amount". In graphs of the most graphic kind, the Report (pp. 22-26) depicts the pronounced rise and increase in crime in the period from 1933 to 1965. The Report draws the conclusion (p. 30) that "most forms of crime—especially crimes against property—are increasing faster than population growth. This means that the risk of victimization to the individual citizen for these crimes is increasing, although it is not possible to ascertain precisely the extent of the increase. All the economic and social factors discussed above support and indeed lead to, this conclusion."

From the many recommendations which the Commission makes we quote those which are notably germane to the issue before the Court:

> "The other issue involves the basic police practice of stopping suspects, detaining them for brief questioning on the street and, for the policeman's self-protection, 'frisking' them for weapons. *Commission observers of police streetwork in high-crime neighborhoods of some large cities report that 10 percent of those frisked were found to be carrying guns, and another 10 percent were carrying knives. If the police were* forbidden to stop persons at the scene of a crime, or in situations that strongly suggest criminality, investigative leads could be lost as persons disappeared into the massive impersonality of an

urban environment. Yet police practice must distinguish carefully between legitimate field interrogations and indiscriminate detention and street searches of persons and vehicles.

The Commission recommends:

State legislatures should enact statutory provisions with respect to the authority of law enforcement officers to stop persons for brief questioning, including specifications of the circumstances and limitations under which stops are permissible.

Such authority would cover situations in which, because of the limited knowledge of a policeman just arriving at the scene, there is not sufficient basis for arrest. Specific limitations on the circumstances of a stop, the length of the questioning, and the grounds for a frisk would prevent the kind of misuse of field interrogation that, the Commission study also indicated, occurs today in a substantial number of street incidents in some cities. As discussed in a later section, such statutes should be implemented by the creation by police administrators of specific guidelines for police action on the street. *A balance between individual rights and society's need for protection from crimes can be struck most properly through this combination of legislative and administrative action. Court review then proceeds under more enlightening circumstances.*

The Commission notes that the U.S. Supreme Court will review this term at least two cases bearing on police authority to stop persons. Of course, any legislation and administrative rules must be consistent with court rulings on this issue." (Italics ours.)

The Federal Bureau of Investigation, in its pamphlet "Crime in the United States" as part of the Uniform Crime

Reports for 1966 has equally startling statistics. Thus (p. 1) it notes in capsule form:

> "Almost 3¼ million serious crimes reported during 1960; an 11 percent rise over 1965.
>
> Risk of becoming a victim of serious crime increased 10 per cent in 1966 with almost 2 victims per each 100 inhabitants.
>
> *Firearms used to commit more than 6,500 murders, and 43,500 aggravated assaults in 1966.*
>
> Daytime burglaries of residences rose to 140 percent in 1966 over 1960.
>
> Property worth more than $1.2 billion lost as a result of 153,400 robberies, 1,370,000 burglaries, 2,790,000 larcenies, and 557,000 auto thefts. Police recoveries, however, reduced this loss by 55 percent.
>
> Arrests for juveniles for serious crimes increased 54 percent in 1966 over 1960, while number of persons in the young age group, 10-17, increased 19 percent.
>
> Arrests for Narcotic Drug Law violations rose 82 percent, 1960-1966. Narcotic arrests 1966 over 1965 up 28 percent influenced primarily by marijuana arrests in Western States.
>
> Police solutions of serious crimes declined 8 percent in 1966.
>
> *Fifty-seven law enforcement officers murdered by felons in 1966. Firearms used as murder weapons in 96 percent of police killings since 1960.*" (Italics ours.)

We also annex as Exhibit "B" and "B2" statistics for the first half of the year 1967.

We annex as Exhibits "A" and "A2" graphs of the vast disproportion of increase in crime as compared to increase in population during the period 1960 to 1966.

The summary of the statistics included in Exhibit "B-2" depicts a picture of crime and violence which justifies its repetition here:

> "Crime in the United States as measured by the Crime Index rose 17 percent during the first six months of 1967 over the same period in 1966. The violent crimes as a group increased 18 percent with robbery up 30 percent, murder 20 percent, aggravated assault 11 percent and forcible rape 7 percent. The voluminous property crimes rose 17 percent as a group. Auto thefts registered a 19 percent rise, burglary 18 percent and larceny $50 and over 16 percent. All cities when grouped according to population had crime increases ranging from an average of 7 percent in cities with over one million population to 23 percent in cities having a population of 500,000 to one million. The suburban areas reported an increase of 18 percent and the rural areas were up 15 percent. Geographically, the upward crime trend was consistent throughout the country. Crime in the North Central States rose 20 percent, 18 percent in the Northeastern States and 16 percent in the Southern and Western States. Murder registered the highest percentage increase in the North Central States while in the Southern, Western and Northeastern States the crime of robbery showed the sharpest increase."

As Exhibits "C2" and "C3" we submit the Bureau's analysis of police killed by felons during the period 1960 to 1966, in a total number of 335 victims. The analysis deals with the nature of the weapons used by the killers, the type of assignment of the police officer and other data which we do not here particularize except that in which the prior criminal records of police killers is thus described:

> "Among the 442 persons who were involved in the police killings, 67 percent had prior convictions on criminal charges and 69 percent of this group had been granted leniency in the form of parole or probation on at least one of these prior convictions. *In fact, 3 of every 10 of the murderers were on parole or probation when they murdered a police officer.*" (Italics ours).

Nor is the non-lethal assault upon police officers to be minimized. The Bureau reports that in 1966 (as is shown by Exhibit "C"), officers suffered 23,851 assaults—a percentage of 12.2 per 100 police officers. Of these 9,113 resulted in injury—a percentage of 4.6 per 100 officers.

This is nothing less than war between society and its criminal element.

In his dissenting opinion in *People* v. *Peters,* 18 N Y 2d 238, Fuld, J. wrote:

> "Of course, there are risks inherent in investigatory activities undertaken by the police but, certainly, it does not follow from that that the police are privileged, absent probable cause, to search anyone who looks or acts suspiciously and to use against him any articles they may find on his person. As I previously observed, 'Other methods are available whereby the police may protect themselves while carrying on their investigations, other procedures which, if utilized, will safeguard the police and the community from the criminal minority without destroying the sense of dignity and freedom with which the law-abiding majority walk the streets.' (People v. Rivera, 14 NY 2d 441, 452 (dissenting opinion), cert. den. 379 US 978.)"

With great deference to the present Chief Judge of the Court of Appeals, we point out that while he suggests the availability of "other methods" whereby "the police may protect themselves while carrying on their investigations**", he offers no example of such other methods; and we believe that the police would be no more enlightened by this advice than we are. We suggest as much the more realistic the approach of Keating, J. in *Peters*:

> "Since the limited detention for the purposes of inquiry was found to be a necessary adjunct to the prevention and discovery of crime, we further recognized that the answer to such an inquiry might be a bullet—in any event the exposure to danger could be very great."

We have so far tabulated but one group of society's victims of the war. We cannot give the statistics for the persons not affiliated with the police who were in one degree or another injured during the perpetration of the crimes shown by the Reports, but we can and do assert that there were such victims: and even one person thus victimized is too much.

In the more grisly classification of "murder victims by age, sex and race, 1966" however, we do annex as Exhibit "D" the Bureau's computation in number, sex and race for that year alone in the total of 9,522 persons.

As one reads the briefs of appellant and *Amici* one might be led to the conclusion that the police are themselves responsible for the deaths and injuries which their forces suffered at the hands of the criminal population. (Even a doctrinaire position cannot lay to the civil victims of the war blame for their deaths and injuries).

Appellant's brief (p. 53) is able to say that "even assuming the forcible, compelled stop is a major weapon in the policeman's arsenal against crime, we submit that the price paid in community alienation is greater than the benefits accruing from its deployment". Quotations by the brief from surveys conducted in several metropolitan areas are deemed to justify the statement (p. 55) that "the conclusion seems inescapable that the asserted gain to law enforcement from use of the 'stop' and most particularly from the use of the forcible, compelled stop coupled with a search, is heavily outweighed by the toll the practice exacts in community-police friction and hostility". We will not debate the point; because to us it seems clear beyond the need for debate that the wounds and deaths shown by factual statistics far outweigh in significance, import and result, the conclusions expressed by the brief which in the last analysis rest only upon opinion.

We do say that if there is resentment among those who are stopped and searched, and found by reason of the search to be amenable to criminal prosecution, their resentment moves us not at all. As to individuals the search of whose person has not been justified by reasonable suspicion—and we of course do not deny that there have been such searches —the answer lies not in the destruction of the right to search, but in better superintendence and implementation of that right (See excerpt from President's Commission report, quoted at page 26 of this brief). Appellant's brief (p. 55 seq.) is itself not unhopeful of a beneficent result from better police practices in this field. It writes: "The focal point of community resentment is, unfortunately, the police. However, the one bright picture which emerges from the various Crime Commissions field studies is that the ex-

perts in the field recognize this and are attempting to persuade the police to solve this problem." We submit that while police practices in the past may merit criticism for excessive and improper utilization of the right to stop and search, it is entirely unrealistic to discount completely the possibility and perhaps even the probability of improvement in use of the power and, so discounting, to advocate its destruction.

This is, figuratively, to believe that the only way to prepare roast pig is to burn down the barn which is the pig's habitation.*

Our last word on this phase concerns police utilization of stop-and-frisk-or-search power where the power affects a completely innocent person. NAACP *Amicus*, arguing that the power gives the police control over the privacy of *all* citizens and that it should for this reason not be granted to the police (in contrast to the traditional power of individual search upon probable cause only) says (brief, p. 10 seq.): "It is true historically, because the Court is now asked for the first time to legitimate criminal investigative activity that significantly intrudes upon the privacy of individuals who are undifferentiable from Everyman as the probable perpetrators of a crime." We acknowledge the literary quality of the allusion, but we submit that this attractive merit cannot hide the real issue before the Court. Neither Everyman nor any other Pilgrim during his life's Progress in an organized society walks alone. Only in the state of nature envisaged by Rousseau is Everyman—and any man—untouched by the presence of every other man making *his* life's Progress. The very fact of living in an organized society compels some notice of, and adherence to,

* Charles Lamb, "A Dissertation Upon Roast Pig."

the wise principles expressed in the maxim *sic utere tuo ut alienum non laedas.* If it be a price for the citizen to pay in return for the privilege of living in a safe society that he should willingly pause for a few moments in the exercise of his unquestionable right of locomotion in order to answer the reasonable inquiry of an officer, (whose responsibility for the preservation of the public peace is in any event a heavy one, and in all events imposed upon him for the very protection of the citizen being questioned), then it is, we submit, but a slight price to pay in return for that protection. It was well said in *State* v. *Hatfield,* 112 W.Va. 424, 427:

> "A law-abiding citizen cannot have a valid objection to the inconvenience of being stopped, so long as he is accorded courteous treatment."

Amici and appellant, in addition to contending that "reasonable suspicion" may not constitutionally be substituted for 'probable cause," also contend that reasonable suspicion can in any event not serve the function of probable cause, which is "to protect the 'liberty of every man' from subjection to police discretion." The reason for this inability, according to NAACP *Amicus* (brief, p. 27, seq.) is that reasonable suspicion is not capable of that objectivity which "probable cause" possesses. We submit that the sought-for distinction between the two tests of probable cause and reasonable suspicion is non-existent except in semantic exercise. *Amicus* attributes to "probable cause" an objectivity, even when exercised by the police officer, which the same police officer cannot utilize in arriving at a determination of "reasonable suspicion." The thought is strikingly expressed (p. 29): "It avoids the

dangerous mysticism of police professional, and professionally motivated, intuition * * *".

We say "strikingly expressed", but at the same time we ask: why cannot the same police officer—who in many instances has been judicially determined to have correctly assessed the facts of a situation into a determination of the existence of "probable cause"—exercise the same faculties of discernment and determination in arriving at a conclusion of the existence of "reasonable suspicion"? We also ask: if this Court has so far trusted the police officer as to authorize his search as an incident to an arrest, the lawfulness of which he has been required to determine for himself, why cannot it not similarly trust him to ascertain whether or not "reasonable suspicion" exists?

Put in another fashion: if this Court has found it constitutionally possible to substitute the officer's judgment for a judicial warrant as the basis for an arrest which is *designed from the moment of arrest to insure the arrestee's prosecution,* why cannot it not with equal constitutional propriety entrust to the same officer the infinitely more limited search which is designed only to effectuate the equally limited purpose of insuring his own safety?

It is moreover not to be forgotten—although appellant and *amici* appear to have forgotten—that the validity of the search authorized by Section 180-a (*People* v. *Taggart, supra*) comes under the same careful judicial scrutiny as does the validity of the traditional search. This Court will be engaged in *Peters* v. *New York,* No. 74, and *Terry* v. *Ohio,* No. 67, in this very process of scrutinizing the constitutional validity of the searches therein involved.

Many Courts throughout the land are daily engaged in testing the validity of search warrants as well as in deciding the constitutional propriety of searches incidental to arrest. Counsel suggest no objection to this exercise of judicial duty and power. On the contrary, there is a concession that what this Court and other Courts have done in this field arises from a necessity created by the existence of potential fallibility in "probable cause" as a standard.

N.A.A.C.P. *Amicus* (p. 29 seq.), conceding that "probable cause" is not an infallible standard write: "This is not to say that 'probable cause' functions unerringly, or with perfect clarity. Of course, it does not. No standard for the case-by-case determination of the legitimacy of police investigative intrusions could." *Amicus,* however, urges: "But the very failings of 'probable cause' in this regard, together with its relative successes, caution against its abandonment in favor of more arcane, more impressionistic, less objective, less historically developed standards." We answer: except for the fact that because of its lateness of creation the police-safety-search permitted by Section 180-a is "less historically developed" than the traditional search, all of the adjectives used by *Amicus* ("arcane", "more impressionistic), and "less objective") are nothing other than the expression of a point of view. Neither "probable cause" nor "reasonable suspicion" is tangible or physical. Neither can be measured by linear measurement nor weighed quantitatively. Each is a concept: and the value of the concept must be determined by the Court by balancing society's interest in proper measure with individual interest. It is our submission that the analysis by Keating, J. in *People* v. *Peters, supra,* of the differences between the two standards is both realistically perceptive and constitutionally correct:

> "Stripped to the barest essentials, 'probable cause' requires satisfactory grounds for believing that a crime was committed, while 'reasonable suspicion' requires satisfactory grounds for suspecting that a crime was committed. The difference between these two standards is proportionate to the difference in degree of invasion between an arrest and a detention, between a full search and a frisk. Such a difference in standards is both reasonable and desirable."

So also, we submit, is his reason for concluding that, again both realistically and constitutionally, the Section 180-a search is unexceptional:

> "The attempt to apply a single standard of probable cause to all interferences—i.e., to treat a stop as an arrest and a frisk as a search—produces a standard either so strict that reasonable and necessary police work becomes unlawful or so diluted that the individual is not adequately protected. The varying standards now in effect through our decision in Rivera and through section 180-a best resolve this problem."

We have heretofore (p. 21, this brief) paid tribute to the sincerity of purpose and scholarship which informs the briefs of appellant and *amici;* and we are pleased to do so again. Nevertheless, we cannot but express our belief that the conception of the Constitution which they develop forgets that characteristic which has enabled it from the beginning to serve so well the needs and interests of a nation whose physical growth and power is matched only by the complexity of the problems inherent in the changes which the country has undergone from the days of the Colonies to our time. Disregarded is the fact that it is not written in the Constitution, as it is "written among the laws of the Persians and the Medes that it be not altered."*

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* Book of Esther I, 19.

The genius of the Constitution has resided in this very faculty of adaptation to new conditions in order to provide new guides for the exercise of governmental power made necessary by these changes. The Constitution, under the wise guidance of this Court, has solved problems which the Founding Fathers could not possibly have foreseen. It was, we suggest, this very factor of adaptability which led Prime Minister Gladstone to characterize the American Constitution as "The most wonderful work ever struck off at a given time by the brain and purpose of man"*.

The Fourth Amendment was the response of the Framers to the oppressive acts of King George III, to Writs of Assistance, to searches without warrants and to searches with warrants unrestricted in scope. Nowhere in the wording of the Amendment can there be found power to search save under the authorization of a judicial warrant. Yet this Court has more than once recognized that the Amendment must be construed, not in literal implementation of its words only, but in reasonable and necessary ascertainment of its meaning and purpose in relation to specific situations. The Court has frequently said that the prohibition against searches is not total—that the Amendment does not prohibit all searches. What is prohibited is only unreasonable searches.

This view of the Amendment has enabled the Court to find in it permission for searches incidental to lawful arrest (*Weeks* v. *United States*, 232 U.S. 383, *United States* v. *Rabinowitz*, 339 U.S. 56). In *Rabinowitz, supra*, the Court, over the vigorous protest of Frankfurter, J. joined in by Jackson, J., extended the power of incidental search

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* American Treasury of Quotations, edited by Clifton Fadiman, p. 521.

so as to include not only the person of the arrestee but the place in which the arrest occurred. The Court wrote:

> "What is a reasonable search is not to be determined by any fixed formula. The Constitution does not define what are 'unreasonable' searches and, regrettably, in our discipline we have no ready litmus-paper test. The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."

It is this principle of construction and determination which we now urge upon the Court.

Change in the *mores* of the nation led the Court to sanction a further variant of the concept of reasonable search. In *Carroll* v. *United States,* 267 U.S. 132, the Court ruled that a search of a moving automobile without a warrant did not offend the Fourth Amendment. Taft, C. J. wisely wrote:

> "The 4th Amendment is to be construed in the light of what was deemed as unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens."

Accord:

Brinegar v. *United States,* 338 U.S. 160.

We urge the acceptance of the complete analogy which this quotation justifies between the right to search in the traditional case and the right to search created by Section 180-a.

The problem involved in the case at bar is a striking example of the need for adaptability and present change.

In the days of the Founding Fathers the criminal—certainly the violent criminal—was most usually a solitary footpad armed with a stave, a sword or a knife. Certainly he was not armed with the complex revolvers and automatic pistols of our day. Nor did the Framers of the Constitution know of highly organized groups of professional criminals, many in number, murderous in instinct and desperate in violence. They dealt in the Fourth Amendment with the conditions which they knew. We ask that this Court adjudicate the constitutionality of Section 180-a as construed by the New York Court of Appeals according to the needs of our day—needs which our Exhibits establish beyond possibility of effective dispute or denial.

The Court has but recently given evidence of its willingness to construe the Fourth Amendment "in a manner which will conserve public interests as well as the interests and rights of individual citizens" (*Carroll* v. *United States, supra*). In *Warden, Maryland Penitentiary* v. *Hayden,* 18 L. Ed. 2d 782, the Court decided that in the course of a permissible search of a residence for a fleeing fugitive, physical evidence of his crime, as differentiated from the instrumentalities and fruit of that crime, were properly and lawfully seized. In so doing it overruled *Gouled* v. *United States,* 255 U.S. 298, which had long been thought to prohibit a search for "mere evidence".

In its latest Fourth Amendment decisions (*Camara* v. *Municipal Court,* and *See* v. *City of Seattle, supra*) the Court, while prohibiting on Fourth Amendment grounds the wholesale entry by municipal health officers, on routine building inspections, into either homes or business premises unless sanctioned by search warrants, nevertheless did in-

dicate that in an emergency situation it would continue to permit

> "... those prompt inspections, even without a warrant that the law has traditionally upheld in emergency situations. See North American Cold Storage Co. v. City of Chicago, 211 US 306 (seizure of unwholesome food); Jacobson v. Massachusetts, 197 US 11 (compulsory small pox vaccinations); Compagnie Francaise v. Board of Health, 186 US 380 (health quarantine); Kraplin v. Truax, 119 Ohio St. 610, 165 N.E. 498 (summary destruction of tubercular cattle)."

The whole point of Section 180-a—the genesis of its enactment and the content of its purpose—is that our contemporary society is in a state of emergency created by the continuingly enormous increase in crime. That there is this condition of emergency does not rest in conjecture or argument. Its existence is proved statistically by the facts and figures we have quoted from the studies of the President's Commission and from the Federal Bureau of Investigation. Its existence, we submit, creates a new era in the history of this country comparable in fundamental significance to some of the other emerging eras during which this Court has adapted various provisions of the Constitution to contemporary facts without impinging upon or detracting from the true meaning and purpose of the Bill of Rights.

In the specific area of Fourth Amendment rights to which Section 180-a is related, we hope that the Court will construe the statute in the spirit noted by Stewart, J. in *Elkins* v. *United States*, 364 U.S. 206, 222:

> "It must always be remembered that what the Constitution forbids is not all searches and seizures, but

> unreasonable searches and seizures. Without pausing to analyze individual decisions, it can fairly be said that in applying the Fourth Amendment this Court has seldom shown itself unaware of the practical demands of effective criminal investigation and law enforcement."

He added:

> "In any event, while individual cases have sometimes evoked 'fluctuating differences of view', Abel v. United States, 362 U.S. 217, 235, 4 L. ed. 2d 668, 684, 80 S. Ct, 683, it can hardly be said that in the overall pattern of Fourth Amendment decisions this Court has been either unrealistic or visionary."

* * * * *

To this point we have sought to express our belief in the constitutional validity of Section 180-a as construed by the Court of Appeals in *People* v. *Taggart, supra:* i.e., as permitting a search rather than only the limited "frisk". We realize, however, that a different assessment of the statute has been made by others. We do not doubt the complete sincerity of the authors of appellant's brief and of those who have prepared the *Amici* briefs. Indeed, there is high judicial support for their views (Fuld, C.J., dissenting in *Rivera, supra, Pugach, supra, Peters, supra,* the case at bar, and *Taggart, supra*).

Therefore, while we entertain the hope that the Court will declare Section 180-a constitutional even in its *Taggart* extent, we must envisage the possibility that the Court will find that the statute thus construed violates the Fourth Amendment. This, however, we believe would not necessitate a complete condemnation of the statute. It is within the powers and practice of this Court in such a situation

to separate the good from the bad, the constitutional from the unconstitutional, and to declare that which is permissible at the same time that it forbids that which is prohibited.

We need not repeat here that which we have said at pages 15 seq. of this brief, nor re-quote those portions of the opinion of Bergan, J. in *Rivera, supra*. We submit them, and particularly Judge Bergan's opinion, as having with complete adequacy demonstrated that if Section 180-a is limited so as to confer upon the police the power to stop and frisk in the proper factual situations of criminal activity and danger to the officer, the statute is entirely constitutional in the context of the Fourth Amendment.

We treat now, also, the limitation on the constitutional utilization of the statute as proposed in the concurring opinion of Van Voohis, J. in *Taggart, supra*. While he concurred in the Court's decision that the statute constitutionally authorized not only a frisk, but a search of the person, he wrote:

> "In the Peters and Sibron cases the writer differed with the court majority only in that it seemed to him that frisking a man's person to discover a revolver, based on suspicion rather than upon probable cause for arrest, could not lead to his arrest and conviction unless what was discovered was a weapon. Peters possessed burglar's tools and Sibron had heroin in his pocket. I thought that the possibility of immediate danger, to the police officer or to the public, arising from the possession of a dangerous weapon was all that justified invading his person for the discovery of weapons, and that, unless weapons were found upon him, the invasion of his person could not be turned to account by the prosecution to convict him of anything other than illegally carrying a weapon."

In his dissenting opinion in the case at bar, he had written (18 N Y 2d 603, 606):

> "If a frisk reveals a weapon, which is the only purpose for which frisking is authorized, then it should be confiscated and be evidence against the accused on a charge of unlawfully possessing or concealing a weapon or in any other criminal context in which the possession of a weapon is a factor. If we go beyond that, then frisking a suspect, which can be done in practice (though not in theory) at the officer's whim, will become a pretext for the general search of the person, without probable cause, which the Fourteenth Amendment was designed to prevent. The power to frisk is an exception to the probable cause rule in search and seizure, and is not a search at all except for the discovery of a dangerous weapon concealed upon the person. There it should end, for all purposes. The protection thereby afforded to a policeman, and to bystanders if a shooting duel ensues, is so manifestly called for as a matter of common sense that the benefits to be derived should not be foregone by bending this wholesome device to a different and unintended purpose and by so doing subtly to subvert an important part of the Fourth Amendment."

That is, he would limit the prosecution purpose of the statute to the weapon, for protection against which the search is authorized.

With great deference to Judge VanVoorhis, we submit that this Court should not, in its delineation of the permissible utilization of Section 180-a, impose this limitation. If, by way of either search or frisk, the officer constitutionally discovers any other contraband the possession of which is criminal, the possessor should not be immune to prosecution. It is settled law that in those cases in which a traditional search is made, whatever contraband is thereby dis-

closed is useable in prosecution for its possession even though it was not described in the warrant or related to the crime for which the possessor was arrested. In *Harris* v. *United States*, 331 U.S. 145. The Court wrote:

> "In keeping the draft cards in his custody petitioner was guilty of a serious and continuing offense against the laws of the United States. A crime was thus being committed in the very presence of the agents conducting the search. Nothing in the decisions of this Court gives support to the suggestion that under such circumstances the law-enforcement officials must impotently stand aside and refrain from seizing such contraband material. *If entry upon the premises be authorized and the search which follows be valid, there is nothing in the Fourth Amendment which inhibits the seizure by law-enforcement agents of government property the possession of which is a crime, even though the officers are not aware that such property is on the premises when the search is initiated.*" (Italics Ours)

That the frisk—or search—which the officer makes under the aegis of Section 180-a has the more limited purpose of self-protection rather than the traditional purpose of prosecution should not be a shield for the wrong-doer. Since he cannot complain of an unlawful invasion of his privacy, he should be held responsible for the consequences of his infraction of the law. The exclusionary rule through which this Court has achieved the enforcement of the Fourth Amendment is grounded upon an underlying constitutional infraction. It should follow that if the infraction is absent, exclusion should not result. It would be an anomalous situation indeed if the wrong-doer were permitted to hide successfully behind the fact of his own wrong-doing.

In sum, if this Court decides that Section 180-a permits a search, or, if not a search, a frisk, the criminal product of the officer's discovery should be available to the State for prosecution based upon possession.

POINT II

The judgment of conviction should be reversed.

Appellant contends that even if the Court declares Section 180-a to be constitutional, the facts of the case did not authorize the search of his person. Therefore, the original order which denied his motion to suppress was erroneous as a matter of law, resulting in a constitutional taint of the judgment of conviction (even though based upon a plea of guilty) which vitiates it.

We agree.

Appellant's arrest cannot be justified by the existence of probable cause to believe that he was guilty of the commission of crime. The eight or more hours during which the officer observed his contacts with known addicts on the street and in the restaurant garnered for the officer nothing but the fact of those contacts. But addicts do not, because of their addiction, forfeit the right to move about freely; nor are they bereft of the right to speak with anyone, so long as their movements and their speech are not in themselves elements of crime. In turn, anyone may lawfully speak to them. Therefore we repeat, until the moment when the officer actually discovered the heroin in appellant's pocket, no cause existed for his arrest for any crime.

That arrest can be justified, if at all, only on the basis of a legal utilization of the power granted the officer by Sec-

tion 180-a. That power, however, could have been lawfully exercised only if there existed the two conditions precedent which the statute requires. We believe that both were absent. Just as appellant could not have been arrested merely because he talked to known addicts, so he could neither be frisked nor searched because these contacts did not in law create a reasonable suspicion of the past, present or imminent commission of crime. This alone should have rendered his entry into appellant's pocket illegal, even if he otherwise reasonably suspected danger to his life or limb. In our view, however, the record of the suppression hearing (see pp. 4-5 of this brief) is insufficient to establish the reasonableness of such suspicion. (We need not, therefore, develop more fully our belief that he did not even entertain this belief.)

There is a third reason which impels us to our position. We have (this brief, pp. 16-18) quoted the reasoning of Breitel, J. by which he arrived at the conclusion that Section 180-a constitutionally authorizes a search of the person. We requote that portion which is here pertinent:

> "Needless to add, the serious problem is suggested only in cases involving serious personal injury or grave irreparable property damage and not by the problems associated with the enforcement of sumptuary laws, such as gambling, and laws of limited public consequence, such as narcotics violations, prostitution, larcenies of the ordinary kind, and the like."

We read this to mean that if the officer's suspicion concerning the commission of crime is a suspicion that the crime is possession of narcotics, he may not stop, he may not inquire, and certainly he may not either "frisk" or search. (If he does none of these things, then of course he will not

be in danger). It is true that the Court of Appeals suggested none of these limitations in any of the cases which preceded *Taggart* into the Court. Specifically, it did not impose the limitation in the instant case, which was decided on July 7, 1966. *Taggart* was decided exactly one year later, July 7, 1967. It is our belief that if the time of decision had been reversed, and if this case had followed *Taggart* after the announcement of the *Taggart* limitation, it would have been reversed by the Court of Appeals. We regret that we must take a position contrary to that of the majority of the highest Court of our own State. Our duty, however, compels us to do so.

We refer to our previous position in the New York Courts. In the Appellate Term we assumed the constitutionality of Section 180-a. Even so, we suggested to the Court that "if the Court finds in this case that there was somewhat less than the requisite element of probable cause present in the officer's search of the defendant, and if the Court also determines that the officer was not operating pursuant to Section 180-a of the Code of Criminal Procedure, that the Court remand back to the original Trial Court in order that further determinations might be made with regard to probable cause." This course of action the Appellate Term did not follow, but without opinion affirmed the judgment of conviction and the underlying order denying suppression. In the Court of Appeals the People's brief contained the statement: "The People take the same position in this Court with regard to the issue of probable cause that they took in the intermediate Appellate Court." But, limiting the phrase "probable cause" to its traditional meaning, the brief justified the search under the provisions of Section 180-a as it had been construed by the Court of Appeals prior to *Taggart*.

For the reasons which we have heretofore expressed, we believe and concede that both in the Appellate Term and in the Court of Appeals the People should have confessed error and consented to a reversal of the underlying order denying suppression and of the judgment itself.

CONCLUSION

Code Crim, Pro. Section 180-a should be declared to be constitutional to the extent that, given the presence of reasonable suspicion of the past, present or immediately prospective commission of crime and also of reasonable suspicion of danger to the peace officer's life or limb, he may stop and search the person. If the search discloses possession of a weapon "or any other thing the possession of which may constitute a crime" that weapon or thing may be used as the basis for prosecution.

In the alternative, and if the Court decides that a search is not constitutionally permissible, but that a "frisk" of the person is, then the weapon or "thing" disclosed by the "frisk" may be similarly used.

However, the judgment of conviction should be reversed and the complaint dismissed.

Dated: Brooklyn, New York,
October 1967.

Respectfully submitted,

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